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THE EXPERIMENTAL ASPECT OF THE ADAMSON ACT. — When the railroad system of the country is about to be tied up for an indefinite period because of a strike by the trainmen for higher wages, both employer and employee being firmly resolved to make no further concessions, and the lack of adequate statistics precluding the resort to a more rational basis of settlement than the relative strength of the two parties, could Congress constitutionally enact a statute compelling the roads to pay an increased wage for a certain limited period during which a government commission might study the situation and gather facts upon which an intelligent decision as to the merits might be based? In upholding the Adamson Law,[1] the Supreme Court has virtually sustained the constitutionality of such an experiment. The Adamson Law, it will be remembered, contains three important provisions.[2] In the first place, as to trainmen engaged in interstate commerce after January 1, 1917, eight hours shall, "in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services." Secondly, the President shall appoint a commission of three to "observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months" and then render a report. Lastly, pending the

[1] 39 STAT. AT L. 721, c. 436.

[2] See 30 HARV. L. REV. 63.

report of the commission and for a period of thirty days thereafter, employees subject to the Act are to be paid for the standard eight-hour workday not less than their former standard day's wage, with not less than pro rata for overtime.

The receiver of an interstate railroad sought an injunction against the enforcement of the Act by the United States District Attorney, on the ground that it was unconstitutional. The court below granted the injunction. The Supreme Court, however, by a five to four decision upheld the validity of the Act.[3] The divergency of views revealed by the opinions of the court, as well as by previous non-judicial discussions, shows how complex is the situation presented for analysis. The decision is clearly an authority for the proposition that in an emergency wages of trainmen may be fixed by statute for a short period in order to avoid a great strike.[4] But this proposition does not cover all phases of the situation. It fails to take into account the fact that a commission is created to study the new arrangements, and that the duration of the wage increase is coincidental with the period of the labors of the commission. These facts point strongly to an experiment which was to be carried on under the observation of the impartial commission. This view is strengthened by the fact that neither side was able during the course of the controversy to produce any comprehensive set of facts or figures bearing upon the subject in dispute. Moreover, three of the dissenting justices expressly took the point that the Act was invalid because it provided for an experiment and threw the cost on the roads. In the light of all this it seems fair to say that the decision does support the constitutionality of an experiment such as was defined in the opening sentence above.

How then is it constitutional to require the railroads to conduct such an experiment? The affirmative power is of course derived from the commerce clause.[5] The ultimate purpose of the information sought is to facilitate the conduct of commerce. That trainmen's wages, the immediate means regulated, are substantially and directly connected with interstate commerce would seem to have been forcefully demonstrated by the course of events last August.[6] The real difficulty, however, is with the due process clause of the Fifth Amendment. For plainly the increase in wages is a taking of property amounting to a large sum. Also there is the limitation upon the liberty of both employer and employee to contract as to the terms of employment. But to come under the ban of the

[3] Wilson *v.* New, Oct. Term, 1916, No. 797.

[4] Cf. People *v.* New York, etc. R. Co., 28 Hun (N. Y.) 543.

[5] Congress has a large so-called inquisitorial power to investigate matters over which it may legislate or act. It must of course have power to summon witnesses and compel the production of papers, documents, etc., in order that it may exercise its legislative function intelligently. See 21 HARV. L. REV. 431. By analogy, however, it seems probable that this power does not extend far beyond the use of such means as have commonly been used by courts of law to elicit evidence. Therefore this power alone is inadequate to sustain the experimental aspect of the principal case. *In re* Chapman, 166 U. S. 661; Kilbourn *v.* Thompson, 103 U. S. 168; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 193; CUSHING, LEGISLATIVE ASSEMBLIES, 2 ed., 253.

[6] It is sufficient to bring the regulation of a thing under congressional power to show that this connection with interstate commerce exists, without the thing itself being actually engaged in interstate commerce. Thus the Federal Safety Appliance Act has been held validly to apply to intrastate trains when merely moving over tracks also used by interstate trains. Southern Ry. Co. *v.* United States, 222 U. S. 20.

Fifth Amendment the taking must occur without due process. That is, after a balancing of all the interests involved on either side the court must be able to say that no reasonable man could declare that balance or proportion to be reasonable or permissible.[7] We have seen what interests of the railroad are being infringed; what interests of the public are being aided which will counterbalance these? We have seen that there were no statistics available that could throw sufficient light upon the problem of wages. The unilluminated points were not only numerous and complex, but of great importance; thus, how high should the wages run as a matter of fairness, as determined by comparison to wages paid in other kinds of work requiring a similar grade of skill and reliability; what scale of pay was necessary to secure a proper grade of trainmen; were the present wages insufficient to enable the men to live up to the desired standard of living; what were the facts as to their present standard of living; how much would the increase cost the roads, and to what extent could the increased outgo be taken care of by compensating economies, etc. *A priori* reasoning and calculating had failed. A properly conducted experiment would yield the necessary information. In three possible ways this would be of great assistance in helping to solve the wage problem. It would give Congress a basis upon which to act intelligently if either the question of a permanent wage regulation or of government ownership of the roads arises.[8] Secondly, it would furnish the material upon which public opinion might form an intelligent judgment. The tremendous pressure exercised by public opinion upon such a question as this, when once it is aroused, shows the imperative need of bringing the proper facts before the country. And thirdly, the information would be of great aid as between the parties themselves in putting the matter upon a basis of reason rather than of force. The accurately conducted experiment is the foundation of our knowledge of the natural sciences today; we are just beginning to realize its value in the social sciences.[9] Thus many of the more progressive factories and even stores are today conducting, as a regular part of their business, experiments and investigations to determine how the relations between employer and employee may be bettered.

This experiment, therefore, subserved useful ends; it was not an unreasonable or arbitrary thing. Even conceding this, however, it has sometimes been objected that it was bad because it made the railroads bear the entire expense. But where the nature of a business renders its

[7] See J. B. Thayer, "The American Doctrine of Constitutional Law," 7 HARV. L. REV. 129, 148.

[8] Congress in its regulation of interstate carriers has gone far in requiring complete reports of all facts concerning the carrier's business, even imposing a system of uniform bookkeeping to facilitate this. Thus in one case a company operating an interstate line of steamboats, and also incidentally an intrastate amusement park, was compelled to include the latter in its bookkeeping scheme and in its annual reports. Obviously the expense of all this is a not inconsiderable taking of property. Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194.

[9] In a recent Missouri case where the rates charged by a gas company were too high, but it was not clear just what would constitute a reasonable rate, the state commission lowered the rates by a certain amount as a test, and continued the case under observation. State *v.* Public Service Commission, 191 S. W. 412. While the power to lower to a reasonable rate was clearly possessed in this case, yet it was expressly being used in an experimental way. See also WIGMORE, EVIDENCE, § 445.

regulation necessary, the total cost of regulation may be imposed directly upon that business. Thus, when South Carolina created a railroad commission, it assessed the whole expense of maintaining that body upon the roads operating within the state, and this was upheld as constitutional by the Supreme Court.[10] So the cost of inspection of mines may be put upon the owner.[11] The fact that the Adamson Law called for action involving expenditure directly by the roads, instead of for acts by government agents the cost of which would be shifted to the roads, should be immaterial.

Of course the amount of property taken under the Adamson Law can only be justified by reference to the particular and peculiar nature of the situation under which it was enacted. Yet weighing all the interests on either side we cannot say that the congressional decision that such measures were necessary was clearly unreasonable. Its constitutionality even as an experiment must therefore be sustained.

STATUTORY PRINCIPLES IN THE COMMON LAW. — There is a present tendency among the laity to criticise almost any court action or decision.[1] Apparently this dissatisfaction rests in good part, if not mainly, on the restricted scope accorded legislation by the courts.[2] In this regard, the criticisms have much justification. For the treatment of legislation by the courts has often been influenced by a distinct hostility felt by them against the intrusion of statutes into the common law.[3] Partially, however, the treatment has its cause in an apparent misapprehension as to the true function of legislation in our scheme of jurisprudence. For statutes have been considered, not an integral part of our organic legal whole but rather as rules to be applied in certain cases because so ordered by the legislature — rules that are somehow distinct

[10] Charlotte, etc. R. Co. *v.* Gibbes, 142 U. S. 386. So also where all electric conducting companies were required to file plans and reports with a commission for supervision, and the total cost put upon the companies. People *v.* Squire, 145 U. S. 175.

[11] Chicago, etc. Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961. So also People *v.* Harper, 91 Ill. 357 (inspection of grain elevators); Louisiana State Board of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015 (inspection of coal oil); Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455 (quarantine inspection of ship); Launer *v.* City of Chicago, 111 Ill. 291 (daily reports from pawnbrokers); State *v.* Cassidy, 22 Minn. 312 (tax on liquor dealers to support an inebriates' hospital). These cases show that causation in fact without culpability is sufficient to allow the shifting of the burden to the causing agent. *Cf.* also New York, etc. R. Co. *v.* Bristol, 151 U. S. 556 (entire cost of converting grade crossing into non-grade crossing put upon the railroad).

[1] The recurrent agitations for the recall of judicial decisions, and the proposed requirements for the judiciary in North Dakota (that is, that three of the five members of the Supreme Court shall be "*bona fide* farmers"), are manifestations of this dissatisfaction.

[2] A typical outburst occurred in the NEW REPUBLIC, January 1, 1916, in connection with the interpretation of the Massachusetts Workman's Compensation Act. In that case, however, the indignation was clearly unjustified. See 29 HARV. L. REV. 336.

[3] "There are great numbers of others [laws] the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury, animosity and hate among citizens, useless expenditure, and many other evils." CARTER, LAW, ITS ORIGIN, GROWTH AND FUNCTION, 3. See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383, 387.